No. ~~908~~ 70-31

In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA; ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

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UNITED STATES OF AMERICA, ET AL.

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A) affirming an order of the Interstate Commerce Commission (J.S. App. B) which authorized the Spokane, Portland & Seattle Railway Co. (SP&S)—now part of Burlington Northern [1]—and the Union Pacific Rail-

[1] SP&S, formerly owned by Great Northern and Northern Pacific, is now a subsidiary of Burlington Northern, Inc. See *Northern Lines Merger Cases*, 396 U.S. 491.

road Co. (UP) to control the Peninsula Terminal Co. (Peninsula), a small terminal switching road whose tracks connect only with SP&S and UP. Two other railroads, the Chicago, Milwaukee, St. Paul and Pacific (Milwaukee) and the Southern Pacific (SP) unsuccessfully sought inclusion in the transaction.

Peninsula presently serves 14 industries along its tracks, and over 80% of its line-haul traffic is already handled by UP and Burlington Northern (J.S. App. B–4—B–5, B–21; Exh. 28, pp. 5–6). Peninsula's tracks run to the edge of a largely undeveloped tract known as Rivergate, and presently ends several miles from five of the six industries located there (J.S. App. B–4, B–5, B–53—B–55; Tr. 302, 378, 606–609; Exhs. 5A, 6). The Port of Portland, which owns Rivergate, hopes some day to develop it fully. If this materializes, there would be a need for rail service to whatever industries may locate there. Should that contingency occur, service could be furnished either by extension from the present SP&S line located near Rivergate or—if problems of heavy curvature, impaired clearance, and low standard tracks could be surmounted—by an extension of Peninsula's line (J.S. App. B–5, B–36—B–37).

In this proceeding, SP&S and UP sought authority to acquire stock control of Peninsula. Milwaukee sought inclusion in the transaction, requesting authority to purchase a one-third share of Peninsula. To reach Peninsula's tracks physically, Milwaukee also requested trackage rights, over other tracks presently owned by SP&S, UP, and Peninsula. South-

ern Pacific also sought inclusion in the transaction and trackage rights. After a full hearing, in which appellants participated, the hearing examiner recommended joint acquisition of Peninsula by all four carriers and approval of concomitant trackage rights. Upon exceptions, however, the Commission (Division 3) concluded that the acquisition only by UP and SP&S should be approved.

Milwaukee claimed the right to own part of Peninsula because of a condition in the Northern Lines merger effectively extending its lines to Portland. See *Northern Lines Merger Cases, supra,* 396 U.S. at 515–516. Noting that Milwaukee could seek relief in the merger proceeding itself (J.S. App. B–19)—a course which the carrier has never taken—the Commission concluded that the condition as presently drawn did not *ipso facto* entitle Milwaukee to buy into Peninsula. Reasoning that the merger condition applied only to trackage owned solely by the Northern Lines, who had agreed with Milwaukee as to its imposition long before the present application was filed, the Commission concluded that Milwaukee's petition could not "be considered to implement that condition" and must, like that of SP, be judged on its own merits. (J.S. App. B–19.)

As to the merits, the Commission, disagreeing with the examiner's approach, found that "the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area" did not "give them the right to serve all industries anywhere within that undefined geographical area" (J.S. App. B–20).

Focusing instead upon Peninsula and Rivergate, the agency reasoned that direct service to Peninsula's industries by SP and Milwaukee, over objections of roads currently there, would constitute "a new operation and an invasion of the joint applicants' territory." (J.S. App. B–20.) Finding that the record failed to establish that UP and SP&S, through control of Peninsula, could not handle present and future traffic in the Peninsula territory adequately, efficiently, and economically (J.S. App. B–23), the Commission concluded that the "adverse effect on SP&S and UP, and the shippers dependent upon them for service, of admitting SP and Milwaukee into ownership and control of Peninsula, would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership" (J.S. App. B–23). The Commission accordingly approved acquisition of Peninsula by SP&S and UP, subject to conditions to protect the traffic of other railroads (J.S. App. B–25–26).

Because of the instant litigation, the effective date of the order was subsequently postponed. In the court below, as here, the United States, through the Department of Justice, urged that the Commission's decision be set aside. By order and judgment of July 9, 1970, the district court dismissed the action, finding, without opinion, that the Commission's decision was supported by substantial evidence and was neither arbitrary nor capricious (J.S. App. A).

ARGUMENT

The case presents no issue warranting plenary consideration by this Court. Some of the questions—involving claims that Milwaukee has been permanently denied access to a new industrial area, contrary to the thrust of the Northern Lines merger—are simply not present on this record. The remaining questions merely invite review of substantial evidence questions, as applied to familiar legal rules.

1. The Department is premature in contending that the Commission's action here has undercut the premises upon which the Northern Lines merger was approved. Indeed, despite the Commission's suggestion (J.S. App. B-19, fn. 10), Milwaukee has not yet even attempted to develop the matter within the merger proceeding itself. All that the Commission has here decided is that the merger condition, granting Milwaukee access to Portland, does not by its present terms confer on Milwaukee a right to participation in the control of Peninsula. The Commission explicitly recognized Milwaukee's right to seek relief in the merger proceeding itself (Ibid). This could readily be done by requesting modification of the prior condition or imposition of a new one. There it will be open to Milwaukee to press for access to Rivergate (or other points) on the grounds of competitive conditions arising out of the merger. Only then will Milwaukee's entitlement to relief in the context of merger considerations be fully developed for decision by the agency.

The Commission was plainly within its discretion in concluding that further relief as to merger conditions should be explored in the merger case, where many more parties would be present and where competitive and other considerations could be broadly examined. As the Commission explained here, "* * * this case cannot be viewed as part of the general realignment of western railroad competition resulting from" the merger (J.S. App. B-19). Moreover *Northern Lines* was still pending before this Court when the instant case was decided. Since the Commission had broadly retained jurisdiction to impose further conditions in *Northern Lines*, there was clearly no need to embark here upon a possible modification of conditions in a merger seriously challenged before this Court. In addition, the potential Rivergate traffic, emphasized by the United States, has not yet materialized, and indeed there are as yet no tracks connecting Peninsula to the proposed Rivergate industrial sites. And in view of the traffic conditions imposed here, and assurances made by SP&S and UP (Exh. 29, pp. 2–3; Exh. 28, p. 6), there is nothing to preclude Milwaukee's and SP's participation in such Rivergate traffic as might eventually develop. In these circumstances, the Commission's decision to "take one step at a time" (*New York* v. *United States*, 331 U.S. 284, 343) was well within its discretion.

2. The remaining contentions present nothing warranting further review and are, in any event, without merit.

a. Arguments as to the primacy of competition in proceedings under Section 5 of the Interstate Commerce Act (Memo. for U.S., pp. 9–11) have been

unsuccessfully urged upon this Court from *McLean Trucking Co.* v. *United States*, 321 U.S. 67 to *Northern Lines Merger Cases, supra*. There is nothing in the present case warranting re-examination of the settled rules that promotion of competition, though a consideration, need not control the Commission's exercise of discretion. *E.g., Northern Lines, supra*, 396 U.S. at 513–514. Similarly it is settled that the resolution of such matters is for the Commission, particularly where, as here, rival applicants seek to control another railroad. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 187–189. Nor was the Commission required to "project an analysis" of the competitive situation after SP&S and UP take over Peninsula. *Northern Lines, supra*, 396 U.S. at 516. And this was particularly so because, as we have shown, the order at bar does not forever foreclose Milwaukee's effort.

b. The principle that "a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized" (J.S. App. B–21) is also merely an application of settled law. "[E]conomy and efficiency in rail operations" (*Northern Lines, supra*, 396 U.S. at 508) is a basic purpose of the Interstate Commerce Act, and the "invasion through new construction of territory adequately served by another carrier * * * may be inimical to the national interest" (*Texas & Pac. Ry.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 278). A

carrier already-serving a territory has "the right not to be subjected to such new competition unless it is found to be in the public interest" (*St. Louis SW Ry.* v. *Missouri Pac. R. Co.*, 289 U.S. 76, 82). These considerations may be especially meaningful in view of current general railroad conditions. Here the Commission found that the Peninsula territory can be adequately served by SP&S and UP, which presently connect with Peninsula and handle the bulk of its traffic, and that "admitting SP and Milwaukee into membership and control of Peninsula" would have an "adverse effect on SP&S and UP, and the shippers dependent upon them for service" (J.S. App. B–23). That conclusion represents merely an application of settled principles to particular facts and presents no issue warranting review by this Court.[2]

c. Appellants' remaining contentions constitute nothing more than an attack upon the Commission's evaluation of the evidence. The face of the Commission's report reveals that it gave full consideration to both the present Peninsula and Rivergate traffic and the possible future traffic which might be generated by Rivergate if it is ever fully developed (J.S. App. B–21—B–23, B–47—B–55). Its conclusion that both the "present and future traffic" can be handled

[2]Appellants' reliance upon Section 3(5) of the Act produces no different result. Their failure to prove that inclusion in the Peninsula transaction was consistent with the public interest under Section 5 also amounts to a failure of proof under Section 3(5). Compare *Transit Commission* v. *United States*, 289 U.S. 121.

"adequately, efficiently and economically" by SP&S and UP (J.S. App. B–23) is a factual determination, sustained by the lower court, that warrants no further review by this Court. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620; *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490–491.

In any event the findings are supported by substantial evidence. UP witnesses had received no complaints about existing service (Tr. 182, 762–763), which the carrier could expand and expedite if future traffic so warranted (Tr. 183–184, 243–250, 763). Indeed a witness for the Portland Public Docks Commission, though advocating four-way ownership, stated that UP had done a "yeoman" job for its nearby traffic (Exh. 23A, pp. 2–3). SP arguments as to deficiencies in existing service, as based on a random 10% sample of shipments, were put in proper perspective by UP as to its service (Tr. 759–766) and in any event merely deal with inferences from evidence. Three shippers located on Peninsula's line had no complaints as to UP and SP&S (Exh. 31, Tr. 362–366; Exh. 32, Tr. 401–406; Exh. 34, Tr. 387–401). While two adjacent potential Rivergate shippers supported SP, their major hope was for single line service which could not occur in any event without substantial fill and track construction (J.S. App. B–22; Tr. 376–378; Exh. 5A), which was by no means certain. The only actual Rivergate shipper appearing at the hearings complained about all railroads serving it, including SP. Its interest was concentrated on special purpose drop-end gondola cars and a possible elimination of a curve in Peninsula's

tracks (Exh. 38; Tr. 301–322)—neither of which goals, as the Commission found, would be furthered by four-way ownership. (J.S. App. B–21—B–22).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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